

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Nathaniel E. Bostic, Sr.,

Plaintiff,

-v-

9:04-CV-676
(NAM/GJD)

Al Simons, Parole Supervisor; Barry Jackson,
Parole Officer; Charles Bour; John Lattimer,
Parole Revocation Officer,

Defendants.

APPEARANCES:

Nathaniel E. Bostic, Sr.
Plaintiff *pro se*

Hon. Eliot Spitzer, Attorney General of the State of New York
Maria Moran, Esq., Assistant Attorney General
615 Erie Boulevard West, Suite 102
Syracuse, New York 13204
Attorneys for Defendants

Hon. Norman A. Mordue, Chief U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

Plaintiff *pro se* brought this action for declaratory, injunctive, and monetary relief under 42 U.S.C. § 1983. In his amended complaint (Dkt. No. 6), plaintiff alleges that defendants violated his constitutional and statutory rights in imposing the conditions of plaintiff's parole and in postponing his final parole revocation hearing. Plaintiff further alleges that defendants retaliated against him for exercising his constitutional right to access to courts.

Defendants move (Dkt. No. 28) to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(6). The motion was referred to United States Magistrate Judge Gustave J. DiBianco for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c).

In a thorough Report and Recommendation (Dkt. No. 30), Magistrate Judge DiBianco recommends that defendants' motion to dismiss be denied as to the claim against defendant Jackson regarding the conditions of plaintiff's parole. Magistrate Judge DiBianco further recommends that the dismissal motion be granted and the amended complaint be dismissed as to all other claims against all other defendants. Magistrate Judge DiBianco recommends that the dismissal be without prejudice as to all claims except for the Thirteenth Amendment claim, as to which he recommends dismissal with prejudice.

In his objection (Dkt. No. 31) to the Report and Recommendation, plaintiff states: "Plaintiff does not file any objections to the Report. Plaintiff does, however, wish to amend his complaint and consolidate this case with civil case number 06-CV-540 (TJM/DEP)."

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court conducts a *de novo* review of those parts of a magistrate judge's report and recommendation to which a party specifically objects. Failure to object to any portion of a report and recommendation waives further judicial review of the matters therein. *See Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993).

The Court agrees with Magistrate Judge DiBianco's recommendation to deny dismissal of plaintiff's claim against Jackson regarding the conditions of plaintiff's parole. With respect to all other claims against all other defendants, the Court reads plaintiff's objection as agreeing to dismissal, provided that the dismissal is without prejudice to the filing of a second amended complaint. The Court agrees with Magistrate Judge DiBianco that all other claims against all other defendants should be dismissed without prejudice, except the Thirteenth Amendment claim, which should be dismissed with prejudice. Upon *de novo* review, the Court finds nothing in the record to suggest that plaintiff could possibly make out a valid claim based on the Thirteenth Amendment.

With respect to plaintiff's request for consolidation with 3:06-CV-540, *Bostic v. City of Binghamton, Carl Smith, J. Fian, and City of Binghamton Police Department*, the motion is denied without prejudice. In the event that plaintiff files a second amended complaint in this action, he may move for consolidation thereafter.

It is therefore

ORDERED that the Report and Recommendation of United States Magistrate Judge Gustave J. DiBianco is accepted and adopted in its entirety; and it is further

ORDERED that dismissal of the claim against Barry Jackson regarding the conditions of plaintiff's parole is denied; and it is further

ORDERED that all other claims against all other defendants are dismissed without prejudice, except the Thirteenth Amendment claim, which is dismissed with prejudice; and it is further

ORDERED the plaintiff's request for consolidation with 3:06-CV-540, *Bostic v. City of Binghamton, Carl Smith, J. Fian, and City of Binghamton Police Department*, is denied without prejudice to renewal in the event that plaintiff files a second amended complaint in this action.

IT IS SO ORDERED.

November 1, 2006
Syracuse, New York


Norman A. Mordue
Chief United States District Court Judge